DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-02752
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel

For Applicant: *Pro Se*

December 7, 2009

Decision

HARVEY, Mark, Administrative Judge:

In December 2007, Applicant had a confrontation with another man, who observed a Glock firearm on Applicant's person. In August 2008, Applicant was convicted in a state court, contrary to his plea, of carrying a concealed firearm. Collateral estoppel applies, and I am bound to accept the criminal court's findings as establishing facts sufficient to satisfy the elements of the offense. Applicant's denial that he carried a concealed firearm is contrary to the judgment of the state criminal court. Applicant failed to mitigate security concerns arising from his criminal conduct. Clearance is denied.

Statement of the Case

On July 30, 2008, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) or security clearance application (Government Exhibit

(GE) 1).[1] On August 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant (Transcript (Tr.) 12; GE 8). The SOR detailed the basis for its preliminary decision to deny Applicant eligibility for a security clearance pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges security concerns under Guideline J (criminal conduct) (GE 8). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on August 30, 2009, and requested a hearing before an administrative judge (Tr. 13; GE 9).[2] On September 21, 2009, Department Counsel was ready to proceed with Applicant's case. On September 28, 2009, the case was assigned to me. On October 27, 2009, Applicant's hearing was held. Department Counsel offered six exhibits (GE 1-6) (Tr. 26), and Applicant offered nine exhibits (AE A-I) (Tr. 28-36). Department Counsel objected to consideration of the statement of Applicant's criminal defense lawyer because he claimed contrary to the court's verdict that Applicant was innocent of the charge (SOR ¶ 1.a)(Tr. 17; AE D). Department Counsel argued this opinion invaded the opinion of the fact finder at the security clearance hearing (Tr. 17, 33-34). The objection goes to the weight rather than the admissibility of AE D. There were no other objections, and I admitted GE 1-6 and AE A-I (Tr. 26, 36-38, 125-126). Additionally, I admitted the SOR, response to the SOR, and Hearing Notice (GE 7-9). I received the transcript on November 5, 2009.

For administrative convenience, I have attached the following hearing exhibits (HE) to the record to assist in the review of the collateral estoppel effect of Applicant's prior misdemeanor conviction: HE 1 (Va. Code Ann. § 18.2-308); HE 2 (ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006)); HE 3 (*Restatement of the Law, Second, Judgments*, § 86 Effect of State Court Judgment in a Subsequent Action in Federal Court); HE 4 (*United States v. Khan*, 2008 U.S. Dist LEXIS 57043 (E.D. Mich., July 21, 2008)); HE 5 (*Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951)); HE 6 (*Otherson v. U.S. Department of Justice*, 711 F.2d 267 (D.C. Cir. 1983)); HE 7 (*United States v. Uzzell*, 648 F. Supp. 1362, 1364 (D.D.C. 1986)); HE 8 *Truesdale v. U.S. Dept. of Justice*, 2009 U.S. Dist. LEXIS 89586 (D.D.C. Sep. 29, 2009)); and HE 9

[1]The certification page was missing from GE 1 (Tr. 27). Applicant did not object to the admission of GE 1 nor did he otherwise raise an authentication issue.

[2]The parties agreed that jurisdiction was established (Tr. 15-17).

(*Restatement of the Law, Second, Judgments*, § 29 Issue Preclusion in Subsequent Litigation with Others).

Findings of Fact[3]

In his response to the SOR, Applicant described his involvement in a confrontation in December 2007; however, he denied culpability for the charged offenses alleged in SOR ¶ 1.a (GE 9). He also described the processing of his criminal charges (GE 9). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 29 years old and was hired as a federal law enforcement agent in 2004 (Tr. 6, 75; GE 6). In August 2006, he quit his job with the federal law enforcement agency because he wanted to pursue business opportunities (Tr. 76). He did not leave his federal law enforcement position because of any problems (Tr. 122-123). Other than brief periods between jobs, he has been employed by government contractors or large corporations to the present (Tr. 77-79). He is 71 inches tall and weighs 175 pounds (GE 6). He graduated from high school in 1998 (Tr. 6). He graduated from college in 2002 (Tr. 6). He majored in business administration and information technology (Tr. 6). He is not married and does not have any children (Tr. 7).

Descriptions of the events that led to Applicant's arrest, prosecution, conviction, and sentencing

Applicant's description[4]

In December 2007 at about 2:00 am, Applicant and two male friends, AM and RS, left a bar earlier in the evening and were walking home (Tr. 89-90). A large male, GV, made derogatory, anti-Semitic remarks to Applicant and his friends (Tr. 91-96). After about three minutes of argument, Applicant, AM, and RS walked about 200 yards away; however, after a minute or two, AM returned to GV's vicinity (Tr. 94-95, 99-100). Applicant and RS heard AM scream (Tr. 99-100). Applicant and RS returned to GV's vicinity and saw GV slamming AM's body on the street (Tr. 99-100).

Applicant told GV that Applicant was a former federal agent, and to get off of AM and to go home (Tr. 101). GV immediately got off of AM, and retreated (Tr. 102). Applicant stood between GV and AM (Tr. 102-103). GV asked Applicant to see his badge or identification, and wanted to know if Applicant was a cop (Tr. 103). Applicant said he was not a federal agent (Tr. 103). GV pointed at Applicant's waist, and asked Applicant what was the bulge on his waist (Tr. 103). Applicant said he had nothing on

[3]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[4]Applicant's SOR response included a comprehensive description of the alleged offense and processing of his case (GE 9). Unless stated otherwise, his SOR response is the source for the facts in this section.

him (Tr. 103). GV moved away from AM towards a townhouse and asked Applicant why Applicant had followed him (Tr. 104). Applicant said he just wanted everyone to go home and for the incident to be over (Tr. 103). GV then went into a nearby townhouse, which was apparently owned by GV's friend (Tr. 104).

Applicant walked to his home, which was about three blocks away (Tr. 104). Applicant lost contact with his friends (Tr. 105). About 30 minutes later, the police came to Applicant's residence (Tr. 105). He advised the police that he had former law enforcement experience, and he had a handgun in his residence (Tr. 107).

Two days later, the police came to Applicant's residence and questioned him (Tr. 108). Applicant provided the same information as previously (Tr. 108-109). The police asked for Applicant's consent to search his residence, and Applicant consented (Tr. 109). The police obtained Applicant's Glock, holster, and ammunition (Tr. 109). The police arrested Applicant for carrying a concealed weapon, and impersonation of a law enforcement official. Both offenses are class one misdemeanors.

On April 4, 2008, Applicant was tried by a judge, and convicted of carrying a concealed weapon (Tr. 110-111). The judge found him not guilty of impersonation of a law enforcement official (Tr. 111). Applicant appealed, and was granted a new trial (Tr. 111).

The prosecutor offered Applicant deferred adjudication for six months without other penalties such as a fine in return for a guilty plea; however, Applicant declined the pretrial agreement. Applicant contended that the prosecutor's generous offer, including subsequent expungement showed the weakness of the prosecution's case (Tr. 114-115).

In August, 2008, Applicant went to trial. Applicant's defense at his criminal trial included a police officer, who explained how an eyewitness, such as GV, who is under stress could mistake a cell phone for a small handgun. The poor lighting (AE I), and similarity between a cell phone and a handgun increases the possibility for error. Another police officer, who was a defense witness, stated that a trained former law enforcement officer, such as Appellant, would never carry a firearm in his belt as GV claimed that Appellant did. Nevertheless, the jury found Applicant guilty of carrying a concealed weapon (Tr. 111). The court fined him $2,500 plus court fees of $741 (Tr. 112). He also forfeited his Glock (Tr. 117). He paid his court costs and fine in April 2009 (AE F).

Applicant believed the case against him was weak. There were no neutral witnesses, photographs of him with a concealed weapon, or admissions by Applicant that he possessed a concealed weapon (Tr. 113-114).

Applicant said he did not appeal his conviction because his lawyer told him he did not have an option to appeal it (Tr. 113). He said he would "always maintain [his] innocence based on what transpired" (Tr. 118).

RS' description

RS and Applicant have been friends for 15 years (Tr. 41). During the last several years, RS and Applicant also lived together (Tr. 44).

RS, AM, and Applicant were together in mid-December 2007, when the altercation with GV occurred (Tr. 41). Applicant was wearing a black overcoat, and had a cell phone that he clipped onto his belt (Tr. 45). They left the bars when they closed at 2:00 am (Tr. 42). RS, AM, and Applicant had all been consuming alcohol (Tr. 51).[5] As they walked down the street, GV, a man who is about 76 inches tall and weighs about 250 pounds, started shouting at Applicant, RS, and AM (Tr. 42, 52). GV made anti-Semitic remarks or slurs (Tr. 42, 64). GV was aggressive and threatening (Tr. 64). RS, AM, and Applicant walked about three blocks away from GV's vicinity; however, AM returned to GV's vicinity and a few moments later RS and Applicant heard a scream (Tr. 43, 53). AM is about 67 inches tall, and weighs about 145 pounds (Tr. 47). RS and Applicant ran back to GV's location and observed GV "body slamming" AM into the street (Tr. 43, 54-55). GV picked AM about a foot off of the ground and threw AM onto the street (Tr. 58). The lighting was poor because there were only a few street lights (Tr. 46-47).

Applicant shouted at GV to stop, and that he is a former federal agent (Tr. 43, 57). GV got off of AM (Tr. 43). RS helped AM (Tr. 43). Applicant placed himself between GV and AM (Tr. 55). GV walked across the street and into a townhouse (Tr. 44, 50). Absent Applicant's intervention, GV would probably have seriously injured AM (Tr. 47). AM was not sufficiently injured to need medical attention (Tr. 58).

RS has never seen Applicant carry a firearm, except when he was on duty with a federal law enforcement agency (Tr. 45). AM wanted charges filed against GV; however, the police would not accept the charges (Tr. 56).[6] GV apparently called the police when he went into the townhouse because the police arrived shortly thereafter (Tr. 59-60). RS and AM remained near the townhouse that GV entered, and Applicant went to his residence, which was about four blocks from the townhouse (Tr. 69-70). The police arrived about five minutes after the assault on AM (Tr. 72). The police interviewed and searched RS, AM, and Applicant (Tr. 60, 67). The police did not find any weapons on RS, AM, or Applicant; however, as indicated previously Applicant had entered his residence before the police arrived (Tr. 67).

GV accused Applicant of possession of a handgun (Tr. 60). GV described the handgun as a Glock 9 mm handgun (Tr. 61). Applicant did own a handgun (Tr. 61). RS testified in Applicant's first trial (Tr. 62-63). RS did not testify in the second trial because

[5]When the police arrived after the altercation and interviewed RS, AM, and Applicant, the police did not conduct any breath or blood alcohol tests on them (Tr. 67).

[6] Applicant contended the police did not want to file charges against GV because they would conflict with Applicant's case (Tr. 101). For example, GV might rely on his 5th Amendment rights when his testimony was needed in Applicant's case (Tr. 101).

he had moved over 1,000 miles from the site of the trial (Tr. 63). GV testified in both trials (Tr. 63). Applicant is a loyal, honest, and trustworthy person (Tr. 65).

GV's description

Although GV testified at both of Applicant's criminal trials, he did not make a statement at Applicant's security clearance hearing. Applicant said that GV said he had a criminal justice degree, and friends in law enforcement (Tr. 119). Based on GV's background, GV could identify handguns (Tr. 119). GV said Applicant had a Glock-handgun stuck in his waistband and the trigger was cocked (Tr. 119). The handgun was not in a holster (Tr. 120). GV did not allege that Applicant pointed the handgun at GV (Tr. 119-120).

Applicant's attorney[7]

Applicant's attorney said GV embellished the facts by claiming he could see the firearm, when lighting conditions were too poor for him to make this observation. GV falsely denied instigating the confrontation and assaulting AM. A neutral witness observed GV assaulting AM from a nearby townhouse window. The prosecution offered suspended imposition of sentence in return for a guilty plea; however, Applicant declined the offer and maintained his innocence, even though if he successfully completed the probation he would not have had a conviction. The offer of such a lenient pretrial agreement was a prosecution admission of the weakness of the prosecution's case. Applicant's counsel personally opined that Applicant was innocent, and GV was lying.

Other evidence

Applicant's performance evaluation for 2007 indicated he was "proficient" or "advanced" in all areas evaluated, except for one area relating to technical expertise which was rated as "emerging" (AE G). His overall evaluation was that he is "proficient" and "meets expectations" (AE G).

Applicant's performance evaluation for 2008 indicated he was "proficient," "advanced," or "exceptional" in all areas evaluated (AE H). His overall evaluation was that he is "advanced" and "exceeds expectations" (AE H). His two evaluations show an upward or positive trend in his performance.

In 2009, Applicant successfully completed the Project Manager's Certification Examination (Tr. 117; AE E). Two supervisors wrote compelling endorsements of his character, trustworthiness, leadership, attention to detail, good judgment, strong work ethic, commitment to national security, and honesty (AE A, C). They opine that Applicant is a superb employee because of his dedication and positive attitude (AE A,

[7] The source for the facts in this paragraph is a letter from Applicant's attorney, who defended him in his two misdemeanor-level criminal trials (AE D).

C). A co-worker and friend, who has known Applicant for almost 10 years, lauded his generosity, helpfulness, strong work ethic, and excellent judgment (AE B).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Collateral Estoppel

The only SOR allegation is that Applicant carried a concealed weapon in December 2007, in violation of Va. Code Ann. § 18.2-308 (GE 5; HE 1). In August 2008, he was subsequently convicted, contrary to his plea, in state criminal court of this offense (GE 5, 8, 9). His conviction is listed as a first class misdemeanor (GE 5, 8, 9).

Va. Code Ann. § 18.2-308 states, "If any person carries about his person, hidden from common observation [ ] any pistol, revolver, or other weapon designed to propel a missile of any kind by action of an explosion of any combustible material . . . he shall be guilty of a Class 1 misdemeanor." (HE 1 at 1-2). GV testified at Applicant's trial that in December 2007 Applicant carried about his person, hidden from common observation (stuck in his waist band) a Glock pistol. Applicant denied that he possessed any firearm when he confronted GV.

At the hearing after a brief discussion of the potential applicability of collateral estoppel, the hearing's participants assumed collateral estoppel did not apply and proceeded with the hearing (Tr. 18-22). I stated I would research the issue and issue a ruling about whether collateral estoppel applied after the hearing (Tr. 19, 125-127).

In ISCR Case No. 04-05712 at 7 (App. Bd. Oct. 31, 2009) the Appeal Board addressed the collateral estoppel effects of a guilty plea to assault and battery, a misdemeanor, in a subsequent security clearance hearing and stated:

> The Board recognizes that *Otherson* [*v. U.S. Department of Justice*, 711 F.2d 267 (D.C. Cir. 1983)] ultimately held that the federal misdemeanor conviction resulting from a contested trial and based on a conduct issue that was before the Merit Systems Protection Board for hearing collaterally estopped the defendant from denying the underlying conduct at his MSPB hearing. Thus, there have been instances where federal courts have given

> collateral estoppel effect to misdemeanor convictions and any language of the Board suggesting otherwise is overstated.[8]

The Appeal Board articulated a three-pronged test for deciding when a prior decision would have collateral estoppel effect in a security clearance hearing:

> First, the party against whom the earlier decision is asserted must have been afforded a "full and fair opportunity" to litigate that issue in the earlier case. *Haring v*. *Prosise*, 462 U.S. [306, 313 (1983)]; *Allen v*. *McCurry*, 449 U.S. 90, 95 (1980). Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. *Montana v*. *United States*, 440 U.S. 147, 155 (1979). Collateral estoppel extends only to questions distinctly put in issue and directly determined" in the criminal prosecution. *Frank v*. *Mangum*, 237 U.S. 309, 334 (1915). Third, the application of collateral estoppel in the second hearing must not result in unfairness. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979)(detailing circumstances where allowing the use of collateral estoppel would result in unfairness); *Montana v*. *United States*, 440 U.S. at 155 (court should consider whether other special circumstances warrant an exception to the normal rules of preclusion).

See also United States v. Holzmann, 563 F.Supp.2d 54, 78-81 (D.D.C. 2008); *United States v. Uzzell*, 648 F. Supp. 1362, 1364 (D.D.C. 1986); *United States v. Khan*, 2008 U.S. Dist LEXIS 57043 (E.D. Mich., July 21, 2008) (all citing *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951) as establishing preclusion effect of a guilty finding from a criminal trial on subsequent civil litigation for the issues resolved against the defendant); *Truesdale v. U.S. Dept. of Justice*, 2009 U.S. Dist. LEXIS 89586 at *10-*12 (D.D.C. Sep. 29, 2009) (listing more restrictive three-pronged test as: (1) same issue; (2) issue actually decided; and (3) application does not result in basic unfairness and holding collateral estoppel bars defendant from pursuing issues in civil court that were resolved against him at his criminal trial) (HE 5-8).

In ISCR Case No. 04-05712 at 7-10 (App. Bd. Oct. 31, 2009), the Appeal Board remanded the case to an administrative judge because there was insufficient information about that applicant's guilty plea (to misdemeanor assault and battery), and the government had erroneously not been permitted to present aggravating information about the greater offense (indecent sexual acts committed upon a child-victim).

Under collateral estoppel, the finding of guilty in Applicant's case by a state criminal court after he contested the facts is binding on the federal government. His criminal conviction is conclusive proof and operates as an estoppel on him as to the facts supporting the conviction. "Under collateral estoppel, once an issue is actually and

[8] I was unable to locate any cases where a federal or state misdemeanor conviction after a contested trial was not given issue preclusion effect. *See* HE 3 (*Restatement of the Law, Second, Judgments*, § 86 Effect of State Court Judgment in a Subsequent Action in Federal Court) and other cases cited in this section.

necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. at 153.

The state court's finding of guilty involves a determination of guilt beyond a reasonable doubt whereas the government need only establish a contested offense at a security clearance hearing by a preponderance of the evidence, a lower evidentiary burden. It would be inappropriate to make a contrary decision when GV, the key witness in the criminal trial, did not make a statement at Applicant's security clearance hearing. Moreover, a contrary decision in a federal agency-forum, would violate the policy promoting comity between the state courts and the federal government. *See* 28 U.S.C. § 1738 and *Allen v. McMurry*, 449 U.S. 90, 96 n.8 (1980). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. at 153-54.

As to particular facts established by his prior conviction, Applicant is estopped from denying that he possessed a concealed firearm on his person when he confronted GV in December 2007. *See* Otherson at 273-274. Applicant is not estopped, for example, from asserting that GV was the aggressor, and that he was ensuring AM did not receive serious injury when he intervened.

Criminal Conduct

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline J (criminal conduct) with respect to the allegations set forth in the SOR. AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes one condition that could raise a security concern and may be disqualifying, ¶ 31(c) provides, "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." The allegation of criminal conduct listed in SOR ¶ 1.a is established. He was found guilty of this offense, and the second finding of guilty in August 2008 is now final. The second finding of guilty is binding on the security clearance hearing. I conclude, therefore, that Applicant possessed a concealed firearm in December 2007.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

There are some important positive signs of mitigation and rehabilitation. The only criminal offense is Applicant's possession of a concealed firearm in December 2007. I accept Applicant's averment as accurate that GV was initially the aggressor, and that he was ensuring AM did not receive serious injury when he intervened in the altercation between GV and AM. His desire to protect a friend from harm is important extenuation. Applicant has achieved a high level of education and received significant law enforcement training. He has completed project manager's certification. He is clearly very intelligent and diligent. There is no adverse information relating to his current or previous employment. He has excellent employment and personal references. The offense happened under such unusual circumstances that it is unlikely to recur.

None of the mitigating conditions fully apply to the offense listed in SOR ¶ 1.a. Applicant has not expressed remorse concerning the offense because he denies that he committed it. I cannot conclude that he was truthful at his hearing and in his SOR response because he has denied that he carried a concealed firearm when he confronted GV. Acceptance of his denial that he possessed his Glock semi-automatic pistol in December 2007, when he confronted GV as truthful and factually accurate would directly contradict the finding of guilty of the state criminal court. Applicant's failure to provide truthful information at his security clearance hearing has created doubt about his "judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guideline J in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is considerable evidence supporting approval of Applicant's clearance. Applicant is a valued employee, who contributes to his company and the Department of Defense. There is no evidence at his current employment of any disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show substantial responsibility, rehabilitation, and mitigation. His supervisors support him and laud his hard work and dedication. I am particularly impressed by his past service to a federal law enforcement agency. There is important extenuation relating to the misdemeanor-level offense. GV was initially the aggressor. GV was much larger than AM. He was ensuring AM did not receive serious injury when he intervened in the altercation between GV and AM. He did not brandish the firearm or point it at GV. His response during the stressful altercation was measured and appropriate.

The evidence against approval of Applicant's clearance is more substantial. Applicant was convicted at a misdemeanor-level state criminal court in August 2008 of possession of a concealed firearm. At his criminal trial, in his SOR response, and at his security clearance hearing, he denied that he possessed a concealed weapon and instead asserted that GV lied about seeing the concealed weapon. Applicant asserted that GV observed a bulge on his belt caused by Applicant's cell phone. Having decided that the criminal court's finding that he possessed a concealed firearm is binding, I logically must conclude Applicant's denial was the presentation of false information at his security clearance hearing. An Applicant who provides materially false information at his security clearance hearing raises security concerns that cannot be mitigated. His decision to deny possession of the firearm when he confronted GV in December 2007 was knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[9] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

[9]*See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Mark Harvey
Administrative Judge